



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: TOM MANHEIM
Communications Director

SUBJECT: BALANCING TEST &
DRAFTS AND MEMORANDA

DATE: April 10, 2009

Approved

Date

4/10/09

RECOMMENDATION

1. Adopt the proposed narrow construction of the Balancing Test to include a category of records that would be routinely released unless the Rules Committee specifically exempted disclosure under the Balancing Test;
2. Adopt the Sunshine Reform Task Force's recommendation on Drafts and Memoranda.

BACKGROUND

The Balancing Test is a general exemption in the California Public Records Act (CPRA) that allows the City to withhold records only when "the public interest served by nondisclosure clearly outweighs the public interest served by disclosure." In addition, under the CPRA, preliminary drafts and memoranda are exempt from disclosure if they are not retained by the City "in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." In previous meetings, the Rules and Open Government Committee (ROGC) considered a proposal from the Sunshine Reform Task Force to eliminate the "Balancing Test" and replace it with four specific exemptions, as well as a proposal to alter the approach to Drafts and Memoranda. The Task Force proposal for Drafts and Memoranda would eliminate the ability to use the Balancing Test and would say instead that once a "proposal, initiative or other contemplated or suggested action is made public, or presented for action by any City body, agency or official" preliminary drafts, notes or memoranda, must be disclosed if they exist as of the time the request is made.

The Committee directed staff to review the Summary of the California Public Records Act prepared by the California Attorney General's Office and draft language narrowly construing the Balancing Test. Staff was also directed to consider whether certain records could be identified that would always be disclosed—essentially a list of records to which the Balancing Test would never be applied. The Chair of the Public Records Subcommittee of the Task Force and counsel for the San Jose Mercury News offered to provide input about application of the Balancing Test to definite lists of documents.

ANALYSIS

Several documents are attached to this memorandum to assist the Committee in reaching a decision.

- Attachment A is an excerpt from the Summary of the California Public Records Act 2004 prepared by the California Attorney General's Office on the "public interest exemption" – also known as the Balancing Test.
- Attachment B to this memo is new proposed language on the Balancing Test. Staff relied on the Attorney General's materials in preparing this proposal. Section C in this proposed language creates a category of records that would require the approval of the Rules and Open Government Committee before using the Balancing Test to withhold records.
- Attachment C is a list of records that are routinely disclosed, which would be included in the special category of records requiring ROGC approval to withhold.
- Attachment D is a memorandum from Chairperson Robinson that discusses the application of the Balancing Test to the more than 800 categories of documents described in the City's records retention schedules.

As Attachment D shows, Chairperson Robinson reviewed the City's Records Retention Schedules – which total 95 pages – and made recommendations based on the categories of records listed in the retention schedules. Unfortunately, record series defined by retention schedules often include a mixture of documents, which, although having the same retention requirements, may possess different characteristics when considering disclosure of those records. Some documents in a series might always be subject to disclosure while others might not be disclosed based upon certain information contained within the document. Staff attempted to translate Mr. Robinson's memo into a list of records that could always be disclosed and to which the Balancing Test would not be applied. However, we concluded that the categories of records listed in the retention schedules are not useful in determining disclosure. As a result, staff abandoned the analysis of the retention schedules.

Instead, we have tried to identify documents that are generally disclosed and would only rarely be subject to the Balancing Test. These documents fall into two categories of records: (1) those that are intended to be disseminated to the public; and (2) those that document a process that must be open to the public. Even within these general categories, however, some information might need to be protected, e.g. "Contracts, Leases and Other Legal Agreements", "Closed Litigation Records" and "Licenses Issued by the City" could include personal, identifying information, and the City usually relies on the Balancing Test to protect such personal information. As a result, staff recommends the creation of a special category of records which would be routinely released. The Balancing Test would only be applied if the Rules and Open Government Committee determined that, based on specific factual circumstances and information, the document should not be disclosed or information within the document should be redacted.

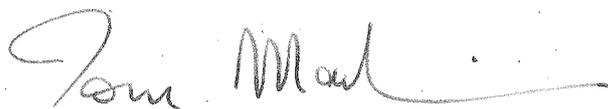
In short, we believe that some flexibility is necessary to protect information in records. The proposed language in Attachment B affords the City the necessary flexibility but is consistent with the Attorney General's interpretation that "[t]he City's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the City's interest that is weighed."

The proposed language in Attachment B clarifying the deliberative process privilege is also consistent

with the Attorney General's materials. The proposed language makes clear that "the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made" and that "[t]he balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question." As long as this language is clear, the Task Force's recommendation on Drafts and Memoranda can be adopted.

CONCLUSION

Staff recommends that the Committee adopt the proposed narrow construction of the Balancing Test contained in Attachment B, with a special category of documents (Attachment C) for which the Balancing Test could only be invoked by a vote of the Rules Committee. The Attorney General's interpretation of the Balancing Test is consistent with staff's application and a clear statement of the City's intent will aid future Administrations.



TOM MANHEIM
Communications Director

ATTACHMENT A

**Excerpt from *Summary of the California Public Records Act 2004*, pp. 10-11
Office of the Attorney General, California Department of Justice**

THE PUBLIC INTEREST EXEMPTION
(Gov. Code, § 6255)

A. The Deliberative Process Privilege

The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made.⁷⁷ Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined with the deliberative material. Under section 6255, a balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.⁷⁸

B. Other Applications Of The Public Interest Exemption

In order to withhold a record under section 6255, an agency must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. A particular agency's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the agency's that is weighed. This "public interest balancing test" has been the subject of several court decisions.

In a case involving the licensing of concealed weapons, the permits and applications were found to be disclosable in order for the public to properly monitor the government's administration of concealed weapons permits.⁷⁹ The court carved out a narrow exemption where disclosure would render an individual vulnerable to attack at a specific time and place. The court also permitted withholding of psychiatric information on privacy grounds.

In another case, a city sought to maintain the confidentiality of names and addresses of water users who violated the city's water rationing program. The court concluded that the public's interest in disclosure outweighed the public's interest in nondisclosure since disclosure would assist in enforcing the water rationing program.⁸⁰ The court rejected arguments that the water users' interests in privacy and maintaining freedom from intimidation justified nondisclosure.

The names, addresses, and telephone numbers of persons who have filed noise complaints concerning the operation of a city airport are protected from disclosure where under the particular facts involved, the court found that there were less burdensome alternatives available to serve the public interest.⁸¹

ATTACHMENT A

In a case involving a request for the names of persons who, as a result of gifts to a public university, had obtained licenses for the use of seats at an athletic arena, and the terms of those licenses, the court found that the university failed to establish its claim of confidentiality by a "clear overbalance." The court found the university's claims that disclosure would chill donations to be unsubstantiated. It further found a substantial public interest in such disclosure to permit public monitoring and avoid favoritism or discrimination in the operation of the arena.⁸²

ATTACHMENT B

Section 6

Public Records

6.1 Public Information That Must Be Disclosed

6.1.2 Other Public Information

...

6.1.2.070 Balancing Test

- A. In order to withhold a record under Government Code Section 6255, the City must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. The City's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the City's interest that is weighed.
- B. The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made. Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined with the deliberative material. The balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.
- C. The following records will not be withheld on the basis of the balancing test unless specifically approved by a vote of the Rules and Open Government Committee:
 - 1. (See Attachment C)
- D. If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification.

ATTACHMENT C

City Records That Are Routinely Disclosed Upon Request

Accounting Records, including accounts payable and receivable, general ledger, banking, and reconciliation, but excluding sales tax and resident utilities billing records.

Geographic and Environmental Data and Records including geographic information systems data, environmental impact reports, and environmental monitoring and testing results.

City Budgets, Proposed and Adopted.

Public Meeting Records, including agenda, minutes, synopses, reports, audio-visual recordings, and most supporting documents, but excluding closed session records and internal City staff meetings.

Calendars after the fact, excluding personal appointments and information.

Staff Reports and Memoranda, excluding those related to closed session or covered by attorney-client privilege.

Summary Statistical Reports.

Employee Compensation.

Development Records and Permits, excluding plans of existing structures.

Contracts, Leases, and Other Legal Agreements, excluding information the disclosure of which would violate personal privacy or intellectual property rights.

Procurement Records after procurement activity has been concluded, excluding individual evaluator ratings and comments and any information the disclosure of which would violate intellectual property rights.

City Master Plans.

Real Property Records.

Labor-Management Agreements.

Facility, Site, and Equipment Safety Inspection Reports, excluding security-related information.

Property Inventories excluding inventories of firearms and security equipment.

Audit Reports and Responses.

Officials and Employees Disclosure Records.

Lobbyist Registration Records.

Election Results.

Closed Litigation Records, excluding information the disclosure of which would violate personal privacy or intellectual property rights.

City Logos, Seals, and Other Branding Records.

Licenses Issued by the City, excluding information the disclosure of which would violate personal privacy rights.

Policies.

Records Retention and Destruction Records.

Published Information.

ATTACHMENT D

MEMORANDUM

To: Mayor Reed, Rules and Open Government Committee

From: Bert Robinson, San Jose Sunshine Reform Task Force

Re: Balancing Test—Application to City Records

Introduction

As you know, I believe that a balancing test is unnecessary to protect any legitimate interests of the City in nondisclosure of sensitive information. Its absence from Sunshine Ordinances adopted by other cities in the Bay Area, to say nothing of the federal Freedom of Information Act, demonstrate that it simply is not required.

However, you asked for a list of proposed exceptions to the balancing test, should the City decide not to eliminate it. I am providing the attached list in response.

In order to respond to your request, I asked staff for a list of all types of records maintained by the City. Tom Norris provided the City's "Records Retention Schedule." It is a 95-page, single spaced table, listing hundreds of categories of records. Mercury News attorney James Chadwick and I have reviewed it carefully. The one fact that is immediately apparent from examining the Schedule is that the vast majority of the records maintained by the City are either indisputably subject to public disclosure, or covered by a specific exemption in the Public Records Act or the proposed Sunshine Ordinance (in particular, the proposed balancing provision, with its four categories of information subject to exemption—see section 5.1.2.070).

Therefore, it clearly will be much more efficient to identify the relatively small number of records that arguably *should* be subject to a balancing test than to try to list the myriad records that clearly should *not* be. In the discussion below, I have made a special effort to list those "balancing test" records, while also including a general discussion of records for which the test is not needed.

However, my review also indicates that virtually all of the categories identified below as potentially appropriate for balancing could be addressed simply by adding a couple new exemption provisions to the existing balancing test in the proposed Sunshine Ordinance. In particular, an exemption providing balancing for proprietary business information that does not rise to the level of a trade secret, but the disclosure of which could potentially harm the submitting party or deter businesses from providing necessary information, would address many of the potential concerns. Exemptions providing balancing for information that would permit unauthorized access to City financial accounts, computer systems, or facilities and for security/disaster recovery plans would address most of the remaining concerns.

Below, I am suggesting a new approach to the deliberative process issue. I continue to consider it critical that the city abandon its use of the deliberative process exemption, as Milpitas and San Francisco have done, because the exemption undermines the very foundation of open government laws: The deliberative processes of government are precisely what citizens have a

right and a need – indeed, a responsibility – to witness. If there is a vigorous debate among city staffers about the best approach to a controversial issue, that debate needs to be brought into the open so the residents of San Jose can participate in it—not cloaked by a dubious privilege.

I am sensitive to concerns expressed by Rules Committee members about their desire to protect communication within their own offices. However, as the City Attorney has explained—and as confirmed by a recent decision in the City’s litigation with Bay 101—the “mental process” privilege afforded to legislators, such as members of the City Council, already protects the discussions and deliberations taking place within your offices. Sutter's Place Inc. v. Superior Court, 161 Cal. App. 4th 1370 (2008). The mental process privilege can be distinguished from the broader deliberative process privilege. Taking this protection and the existing exemptions provided by the Public Records Act and the proposed Sunshine Ordinance into account, there are very few records that may merit a balancing test. Those few exceptions are identified below.

Categories of Records

1. City Attorney's records (1-22): There are specific exemptions that thoroughly protect the City's interests in records of the City Attorney's Office. If there are records that aren't covered by those specific exemptions, they ought to be public, and the balancing test is not appropriate. The City Attorney's Office has not to date asserted a need for a balancing test with respect to its records. I am informed that the balancing test is not typically invoked by public agencies or applied by the courts to the records of public agency attorneys.
2. City Auditor's Records (23-30): Anything that may need to be withheld is protected by a specific exemption and so no balancing test is required, with the following exceptions where the balancing test could be employed: Special studies (27), and business license audits (29).
3. City Clerk's Records (800-823): Nothing in the city clerk's office should be covered by the balancing test. With only a few exceptions, the records of the City Clerk's Office are all required to be provided to the public. The few exceptions are covered by express exemptions (for example, Government Code section 6253.5).
4. City Council Records (861-871): Between the “mental process” privilege for legislative representatives (i.e., City Council members) and specific exemptions (for example, the exemption for personal information regarding citizens), there is no need to apply the balancing test to City Council Records, most of which are indisputably subject to public disclosure.
5. City Manager's Records (528-682): Certain categories of records of the City Manager are clearly subject to public disclosure, specifically Budget Office records (540-579) and Communications records (661-668). No balancing test is necessary or should be applied to these records. The same is true with respect to most of the other records maintained by the City Manager. The exceptions where the balancing test may be appropriate are: Records of interactions with council members (538) and the project files of senior staff (560), and records relating to emergency services.
6. While City staff has asserted a need for a balancing test with respect to personnel records (552-556), the existing provisions of the Public Records Act (Government Code section 6254(c)) already contain a balancing test that protects private information in personnel records.

The provisions of the Public Records Act and the proposed Sunshine Ordinance are more than adequate to protect all legitimate concerns.

7. Citywide General Files (146-573): Most of these categories of records are clearly subject to public disclosure or are covered by specific exemptions. For example, personal information mailing and contact lists (567) would be specifically exempted under the proposed Sunshine Ordinance. Drafts (569) are addressed by the Public Records Act and the Sunshine Ordinance. The only records for which a balancing test may be appropriate are: Routine meeting records (153), general correspondence and communications (154), convenience copies to the extent that the records in such files are copies of records otherwise subject to the balancing test (568), procurement and purchasing records to the extent they contain sensitive financial or business information not otherwise exempt from disclosure (170), department checking accounts to the extent they contain account numbers or other information that could be used to identify or access financial accounts at outside institutions (174, 175), and possibly emergency preparedness records (161).

For the same reasons discussed above, Human Resources records (148-152) are adequately addressed by specific exemptions in the Public Records Act and the Sunshine Ordinance. Exemptions for personal information in the Sunshine Ordinance and for personnel, medical, and similar files in the Public Records Act are also sufficient to address concerns over any private that may be contained in incident reporting and investigation records (573).

8. Economic Development Records (701-719): Proprietary business information submitted by private businesses and included in records covered by categories 701-712 (and perhaps 716) may be appropriate for the application of a balancing test, to the extent that it does not constitute trade secrets (which are already exempt under Government Code section 6254(k)). However, as I mention above, a more transparent and consistent approach would be to craft a specific exemption to cover these records.

9. Finance Records (291-330): Existing exemptions for information required from taxpayers in connection with the collection of local taxes (Government Code section 6254(i)), utility customer records (Government Code section 6254.16), and similar provisions will take care of nearly all concerns. Possible exceptions to which balancing might be applied would be: Unsuccessful bids and proposals (382); banking records (295-296) to the extent they contain account numbers or other information that could be used to identify or access financial accounts at outside institutions; and loan documentation (309) that contains proprietary information of private individuals or businesses.

10. Fire Records (751-783): Records of employee exposures to toxic substances may contain sensitive information, but such information is already governed by the provisions of the Public Records Act and the proposed Sunshine Ordinance addressing personnel, medical, and similar files. The same is true with respect to candidate recruitment files (754 and 755) and paramedic records (765), accident investigation reports (781) and vehicle accident records (782). It may be appropriate to apply a balancing test to fire investigations by the bureau of fire prevention (772).

11. General Services Records (901-909, 331-365): The express exemption in the proposed Sunshine Ordinance, together with existing exemptions in the Public Records Act, are sufficient to address concerns regarding the vast majority of records in this category. For example, one past situation that has been mentioned by City staff is the City's pet license database. That case was decided under the general balancing test in the Public Records Act, and personal

information in that database would still be exempt under the proposed Sunshine Ordinance. DMV records are also the subject of an express exemption under the Public Records Act. There does not appear to be any need for a balancing test with respect to these categories of records.

12. Housing Records (188-203): To the extent that housing records include sensitive personal information, that information would be subject to balancing and exemption under the personal information provision of the proposed Sunshine Ordinance. Proprietary information submitted by business that may appear in some of these categories (209-211) may be appropriate for balancing.

13. Human Resources (461-526): Certain categories of Human Resources records clearly raise privacy concerns: EAP files (469), personnel benefit files (471), personnel files (486 and 487), employee medical files (494), drug test records (505-6), and worker's comp records (523-526). However, all of these categories of records are the subject of express exemptions under the Public Records Act and the Sunshine Ordinance. No balancing test is required to address them.

14. Independent Police Auditor (177-186): To the extent that the IPA's powers are truly investigatory, any information that relates to investigations of complaints regarding identified peace officers is already exempt from disclosure under California law. To the extent they contain personal information provided with an expectation of confidence, there is an express provision in the proposed Sunshine Ordinance to address that. There is no need for a balancing test here.

15. Information Technology (683-693): To the extent that any of these records constitute actual software, they are exempt from disclosure under the Public Records Act. Categories that may be appropriate for balancing are: Usage and monitoring records (683), disaster preparation and recovery plans (685), and hardware and software documentation (687).

16. Library Records (1070-1120): Library registration and circulation records are exempt from disclosure under the Public Records Act. None of the other records in this category require the application of a balancing test.

16. Mayor's Office Records (850-860): As discussed above in connection with City Council records, the "mental process" privilege for legislative representatives and specific exemptions under the Public Records Act and the proposed Sunshine Ordinance (for example, the exemption for personal information regarding citizens), are adequate to protect information in the Mayor's records. There is no need to apply the balancing test.

17. Parks, Recreation & Neighborhood Services (910- 1044): Specific existing exemptions in the Public Records Act and the Sunshine Ordinance would protect most of the categories of potentially sensitive information, such as may be contained in accident records (925), incident reports (926), complaints (927), taxes (928), background checks for potential employees (987), etc. There do not appear to be any categories of records as to which a balancing test is required.

18. Planning, Building and Code Enforcement (580-660): Most of the records in this category are not sensitive. City staff has said that investigative files (589-592) are generally open. However, a balancing test may be appropriate to address unusual circumstances in which sensitive information is contained in files pertaining to particular investigations or

enforcement proceedings. No other code enforcement or planning files should be subject to the balancing test.

19. Police Records (31-106, 341-345, 694-695, 107-145, 696): Police records are already the subject of pervasive statutory exemptions (Government Code sections 6254(f) and 6254(k), Penal Code section 827 et seq., Government Code section 1040, etc.). They are also the subject of specific provisions of the proposed Sunshine Ordinance. There is no need for a balancing test.

20. Public Works Records (601-634): Worker's compensation records (602, 603) and the like are already covered by express exemptions in the Public Records Act. None of the other records in this category requires the application of a balancing test.

21. Retirement Records (1051-1062): Existing specific provisions in the Public Records Act and the proposed Sunshine ordinance are sufficient to protect sensitive information in these records. No balancing test is required.

22. Transportation Records (247-290): With the possible exception of personal or proprietary information in grant applications, nothing in the transportation records should be subject to the balancing test.